

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WALTER DOUGLAS	:	DETERMINATION
D/B/A SWEET & LOW WHOLESALERS	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1984	:	
through May 31, 1987.	:	

Petitioner, Walter Douglas d/b/a Sweet & Low Wholesalers, 235-37 West 125th Street, New York, New York 10027, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through May 31, 1987 (File No. 805971).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 20, 1989 at 9:00 A.M. Petitioner appeared by David H. Springsteen, Jr., P.A. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether petitioner filed a request under Tax Law § 170(3-a) within 90 days of mailing of a notice of determination (20 NYCRR 4000.3[c]) for a conciliation conference as provided by Tax Law § 170(3-a) and whether any delay in filing can be excused.

FINDINGS OF FACT

(a) Petitioner, Walter Douglas, who resides at 49 St. Nicholas Terrace, New York City, operated a women's clothing business under the name of Sweet & Low Wholesalers at 215 West 125th Street, New York City. This business sold at both wholesale and retail. (The address on its letterhead was 215A West 125th Street, but the address petitioner used and the address on the Division of Taxation's records appears to have always been 215 West 125th Street.)

(b) Sweet & Low Wholesalers was relocated from 215 West 125th Street to 235-37 West 125th Street sometime in 1988.

(a) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on March 16, 1988 for sales and use taxes due in the amount of \$42,840.51, plus penalty of \$10,976.33 and interest of \$11,876.33, for a total amount due of \$65,693.17. A second notice was issued on the same date for penalty under Tax Law § 1145 in the amount of \$3,175.82 for the period June 1, 1985 through May 31, 1987.

(b) Those notices were issued timely pursuant to consents extending the limitation

period. On November 12, 1987, petitioner signed a consent extending the period of limitation for the period June 1, 1984 through November 30, 1984 to March 20, 1988. On August 14, 1987, petitioner signed a consent extending the period of limitation for the period June 1, 1984 through August 31, 1984 to December 20, 1987.

(c) The address on the consents extending the limitation period was 215 West 125th Street. The same address is shown on the power of attorney filed by Mr. Springsteen on July 3, 1987 and on both notices of determination.

(d) The notices were also sent to petitioner's representative at the address shown on his power of attorney: 160 Fifth Avenue, New York, New York. The certified letter containing these notices was unclaimed.

(a) A request for a conciliation conference was signed on June 16, 1988 and mailed by certified mail postmarked on June 18, 1988 and received by the Bureau of Conciliation and Mediation Services on June 24, 1988. This request showed the address of 215 West 125th Street.

(b) This request was postmarked 94 days after the notice of determination was mailed.

(c) The request for conference was denied on July 15, 1988.

A petition for a hearing was filed on August 17, 1988. This petition showed the address of 235-37 West 125th Street.

CONCLUSIONS OF LAW

A. A petition for a hearing before the Division of Tax Appeals must be filed within 90 days of the date of a notice of determination (Tax Law § 1138[a][1]). This time is suspended, however (Tax Law § 170[3-a][b]), if petitioner files a request for conciliation conference under Tax Law § 170(3-a). This request must itself be filed, however, within 90 days of the date of the notice of determination (20 NYCRR 4000.3[c]). In this case, it is clear that the request for conciliation conference was four days late. This may have been due to the fact that petitioner had moved to a new address and did not promptly receive the notice of determination. However, the Division of Taxation had already sent the notice to the only address it had for petitioner (see Tax Law § 1147[a][1]) and petitioner must be held responsible for such misdelivery. (The petition for a hearing itself was filed within 90 days of the denial of a request for a conference, but over six months after the notice of determination was mailed.) There is no provision in the law under which these delays can be excused. Where time limits in a statute are specific and definite, relief from such provisions has been denied even though the results can be quite harsh (Furey v. Milgrom, 44 AD2d 91; Simmons v. United States, 208 F Supp 744, 746; Taylor v. Commissioner, 54 TCM 129). The judicial function is limited to interpreting the law and not to legislate. The remedy for an unjust statutory provision is legislation (cf., Mertens, Law of Federal Income Taxation, § 3.04).

B. The petition of Walter Douglas d/b/a Sweet & Low Wholesalers is dismissed.

DATED: Troy, New York
February 8, 1990

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE